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separation of powers provision in order to arrive at what in essence amounted to a more expedient and practical result.

Daniel L. Schofield

Estate Tax—The Relevancy of State Court Adjudication of Property Rights

In 1930 decedent, *D*, created a revocable trust which as amended in 1931 provided his wife, *W*, with income for life and a general power of appointment over the corpus. In 1951 *W* executed an instrument purporting to change it to a special power. Upon *D*'s death in 1957 the executor of the estate in paying federal estate taxes attempted to claim the value of the widow's trust as a marital deduction under section 2056(b)(5) of the 1954 Internal Revenue Code.¹ However, the commissioner determined that the trust corpus did not qualify because of the 1951 release. The respondent, who was the executor, then filed a petition for redetermination in the Tax Court. However, while this was pending the respondent filed a petition in the Supreme Court of New York asking for a determination of the validity of the release. The state court found the release to be a nullity; the Tax Court then accepted the state court judgment as being an, "authoritative exposition of New York law and adjudication of the property rights involved," and allowed the marital deduction. *Held*; reversed and remanded. When the application of a federal statute is involved the decision of the state trial court as to an underlying issue concerning relevant property rights is not controlling if there is no decision by the highest court

¹ Int. Rev. Code of 1954, § 2056 (b) (5):

Life estate with power of appointment in surviving spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, . . . with power in the surviving spouse to appoint the entire interest, . . . (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest . . . so passing, shall, for the purposes of subsection (a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for the purposes of paragraph (1)(A) be considered as passing to any person other than the surviving spouse. . . .

of the state concerning the matter. When there is no decision by the highest court of the state, federal authority must apply what it finds to be state law after giving proper regard to relevant rulings of other courts of the state. *Commissioner v. Bosch*, 385 U.S. 966 (1967).

State law is involved to some degree in almost all federal tax determinations. Many times parties procure a state court judgment purely for tax purposes, thus making possible post-death estate planning.² The principal case represents the United States Supreme Court's position as to whether a federal court or agency in a federal estate tax controversy is conclusively bound by a state trial court adjudication of relevant property rights made in proceedings to which the United States was not a party.

The settled rule is that state proceedings do not have the effect of *res judicata* on the commissioner when he is not made a party to the proceedings.³ As a result an analysis of federal court decisions reveals three positions as to the conclusiveness of state court adjudication of property rights.

One position is that the federal court should consider itself bound by a state court decree only after independent examination of the state law as determined by the highest court of the state.⁴ The advocates of this position say that if the highest court in the state has not passed on the matter then the federal court should not be bound but should decide the case as they feel the highest state court would have decided it.⁵

A second view expresses the idea that a state court adjudication is binding on the commissioner when the judgment is a result of an adversary proceeding in the state court.⁶

Advocates of a third school of thought argue that if the issue has been fairly presented to a state court for its independent decision and it is so decided, the resulting judgment, if binding upon the parties under state law, is conclusive as to the property rights in the federal tax case.⁷

² Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 YALE L.J. 783 (1941).

³ *Freuler v. Helvering*, 291 U.S. 35 (1934).

⁴ *Faulkerson's Estate v. United States*, 301 F.2d 231 (7th Cir. 1962), cert. denied, 371 U.S. 887 (1962).

⁵ *King v. Order of Travelers*, 333 U.S. 153 (1948).

⁶ *Pierpont v. Commissioner*, 336 F.2d 277 (4th Cir. 1964).

⁷ *Gallagher v. Smith*, 223 F.2d 218 (3rd Cir. 1955).

In adopting the first position, that the Commissioner should be bound only by decisions of the highest court in the state, the majority in the principal case views the problem as one of construing a federal taxing statute. Since a federal taxing statute was being construed, the Court looked to the legislative history surrounding its adoption. In surveying the history of this statute, the court found that the report of the finance committee used "very guarded language" in referring to the effect of state court decisions.⁸

The majority reasoned that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should not be controlling. The court said this is but an application of the rule of *Erie Railroad v. Tompkins*.⁹ *Erie* dealt with cases of diversity of citizenship, saying that state law as announced by the highest court of the state was to be followed. The court applied *Erie* in the principal case even though the latter was not a diversity case, saying, "the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the state's highest court is the best authority on the law."¹⁰

The majority in *Bosch* justified their position as one that will avoid much of the uncertainty resulting from the "non-adversary" approach while at the same time it will be fair to the taxpayer and protect the federal revenue.

Faulkerson's Estate v. United States,¹¹ involved a situation somewhat analogous to the principal case. In *Faulkerson* the Commissioner was attempting to recover federal estate taxes but was faced with an Indiana Circuit Court decree in an *ex parte* proceeding which declared Mrs. Faulkerson to be the sole beneficiary of her husband's will and therefore entitled the estate to take a marital deduction of one-half the value of the adjusted gross estate for federal tax purposes.

The court in *Faulkerson* was at least in partial accord with the majority in *Bosch*. In *Faulkerson* the court said the District court

⁸ The report indicates that "proper regard," not finality, "should be given to interpretations of the will" by state courts and then only when entered by a court "in a bona fide adversary proceeding." See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4.

⁹ 304 U.S. 64 (1938).

¹⁰ Commissioner v. Bosch, 385 U.S. 996, 87 S. Ct. 1776, 1783 (1967).

¹¹ 301 F.2d 231 (7th Cir. 1962), cert. denied, 371 U.S. 887 (1962).

was not bound by the circuit decree since the circuit decree was rendered in an *ex parte* proceeding and collusive in the sense that a decision was sought which would adversely affect the government's right to additional estate tax. The *Faulkerson* decision relied heavily on the fact that the decision in the circuit court was from one of approximately 84 such courts of equal jurisdiction in Indiana whose decisions are not binding on each other.

Another case that seems to be in accord with the *Bosch* majority on the question of the binding effect of state court decrees is *Brainard v. Commissioner*.¹² In *Brainard* the court held that federal courts were not bound by Illinois circuit courts of equal jurisdiction which are not bound by the rulings of each other. The court said that for the interpretation of the laws of Illinois one must look to the supreme and appellate courts of that state because their rulings are binding upon all of the inferior courts of Illinois.

As stated earlier a second group of cases has taken the position that the Commissioner should be bound by the state court decisions only when they are the result of an adversary proceeding. These cases would not go as far as the majority in discrediting all lower court rulings, but would only rule out those cases decided in the lower state courts where there was not a true adversary proceeding. Chief among these cases is *Pierpont v. Commissioner*.¹³

In *Pierpont* the court was asked to determine the validity of a state court decision declaring that a widow held the requisite power of appointment which enabled her to qualify for a marital deduction in filing federal estate tax returns. The court cited *Morgan v. Commissioner* which said, "state law creates legal interests and rights. The federal revenue acts designate what interests . . . shall be taxed."¹⁴ However, the court in *Pierpont* said it did not feel that the Commissioner should be bound by this decision of the state court because it was a non-adversary proceeding by which the court did nothing more than "rubber stamp" a decree without any independent inquiry of law.

Mr. Justice Harlan, who dissented in the principal case because he felt state court decisions could be considered binding under certain circumstances, took a position much like *Pierpont*. Justice

¹² 91 F.2d 880 (7th Cir. 1937), *appeal dismissed*, 303 U.S. 665 (1938).

¹³ 336 F.2d 277 (4th Cir. 1964).

¹⁴ 309 U.S. 78, 80 (1940).

Harlan felt that because of the balance required between federal and state judicial systems, the following criterion were appropriate for consideration in adopting a rule: (1) uniformity in the administration of law, (2) states' rights in measuring the requirements of their own laws, and (3) protection of federal revenues from ill-considered state court decisions.

For these reasons Justice Harlan took the same position espoused in *Freuler v. Helvering*,¹⁵ stating that the Commissioner should not be bound by lower state court decrees unless the proceeding was untainted by fraud, and the decisions were the result of reasoned argument from parties holding genuinely inconsistent positions. As can be seen this follows *Pierpont*.

A third opinion, expressed by Mr. Justice Douglas, also dissenting in the principal case, said the whole question in the case was simply whether a federal court can ignore a state court judgment when federal taxation depends on property rights already judged by state court proceedings.

Justice Douglas, citing *Cities Service Oil Co. v. Dunlap*,¹⁶ said that it has always been held that federal courts must look to state legislation and state decisions for the state law to be applied. Moreover, he cited cases stating that the federal court is obligated to follow the decision of a lower state court in the absence of the decisions of the state supreme court showing that the state law is other than announced by the lower court.¹⁷

Mr. Justice Douglas relied on *Blair v. Commissioner*.¹⁸ In *Blair* the federal court had held that assignments under a trust were invalid and the income was taxable to the beneficiary. The trustees then brought an action in a state court where, contra to the federal court ruling, the assignments were determined to be valid. On appeal the United States Supreme Court held that there was final adjudication of the property rights in the state court, and the federal court had to give credence to the rights as decided. The significance of the *Blair* decision here is the fact that it was long followed as the leading case in this area; however, the decision of the majority in *Bosch* seems to be opposite the holding in *Blair*.

¹⁵ 291 U.S. 35 (1934).

¹⁶ 308 U.S. 208 (1939).

¹⁷ *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940).

¹⁸ 300 U.S. 5 (1937).

Justice Douglas felt, that by not giving effect to a state court determination, an unfair treatment of taxpayers and a system contrary to congressional purpose of making federal tax consequences depend upon rights under state law would result. Justice Douglas anticipated the problem of taxing an individual or his estate for benefits which he does not have under state law.

The dissent by Justice Douglas appears to be consistent with the position of the Third Circuit in *Gallagher v. Smith*.¹⁹ In *Gallagher* the court said it was not necessary to reach a conclusion as to whether the proceedings were adversary or non-adversary; but, the test should be whether the adjudication of property rights was final and binding under state law, and was not obtained by collusion for the purpose of defeating the tax.

The opinion of Justice Douglas seemed to question the relevancy of the *Erie* doctrine as adopted by the majority. The *Erie* doctrine does, after all, seek to establish the criteria whereby federal courts are to determine the law generally applicable to diversity cases.²⁰ It is not directed at the effect to be given a prior state court judgment affecting property rights of a party against whom a tax liability is asserted. Furthermore, wide application of the *Erie* doctrine, as interpreted by the majority, may lead to the imposition of a tax against a person who has been the prevailing party in a lower state court proceeding and has no ground for appeal to the highest court in the state to discover whether his property rights were properly adjudicated.

It appears that the decision in the principal case has helped to eliminate one more tax avoidance device in the estate tax structure. However, this was accomplished at the expense of giving the Commissioner more authority in making his own determinations of state law in applying the federal taxing statutes. This may seem a large price to pay because many practical problems could arise from this licensed federal power of interference with state court decisions. It remains to be seen how far the Commissioner will go in exercising this power.

The court in the principal case dealt at great length with the problem of construing federal taxing statutes. However, the opinion

¹⁹ 223 F.2d 218 (3d Cir. 1955).

²⁰ C. WRIGHT, FEDERAL COURTS 194 (1963).

did not give any indication as to whether the decision will be applied to non-tax cases where the decision of a lower state court is involved.²¹ Conceivably the principles enunciated in *Bosch* could be applied to non-tax federal cases as well as tax cases.

Patrick David Deem

**Evidence—Expert Testimony—Quantity and Quality
Required to Establish Causal Relation**

P's decedent was injured in an automobile accident when he was thrown violently against his seat belt placing sudden, severe pressure on his abdominal and pelvic organs, and allegedly resulting in the aggravation and acceleration of a pre-existing cancer of the left testicle. The cancer subsequently spread through decedent's body, and he died some nine months later. There was a jury verdict for *P* in her action charging *D* with negligence. *Held*, affirmed. Expert medical testimony, standing alone, stating there is a *possibility* of a casual relationship between a given accident and subsequent death is not sufficient. However, when such expert testimony is combined with uncontradicted non-expert evidence as to the decedent's general good health prior to the accident, including evidence that he had had no prior difficulties with his testicles, prostate, urinary tract, or kidneys, the evidence is sufficient to establish a causal relationship. *National Dairy Products Corporation v. Durham*, 154 S.E.2d 752 (Ga. App. 1967).

Courts vary considerably on what quantity and quality of expert testimony are necessary to establish a causal relationship. Although most courts accept probability as sufficient, some jurisdictions take the more lenient Georgia view and permit evidence of possible connection along with other evidence to satisfy the requirement.

The dissent in the principal case stressed the need of *probability*. Contending that the causal connection upheld by the majority was too speculative and conjectural to support a recovery, the dissent reasoned that use of the words "if," "possibility" and "might" by

²¹ See *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967) where in vacating the final decision of the Secretary of Health, Education and Welfare, the court held that the determination by the Superior Court of Puerto Rico that children were the sole and universal heirs of the wage earner was *res judicata* on the administrative agency.